UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

SPECIALTY HEALTHCARE AND REHABILITATION CENTER OF MOBILE.

Employer,

and 15-RC-8773

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO,

Union.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial
Organizations (AFL-CIO), as *amicus curiae*, submits this brief addressing the
questions raised in the Board's Notice and Invitation to File Briefs in *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB No. 56 (Dec. 22,
2010). The Board seeks input regarding two broad sets of questions, which we
summarize as: (1) whether the Board should reconsider its approach – as set forth
in *Park Manor Care Center*, *Inc.*, 305 NLRB 872 (1991) – to determining
appropriate bargaining units in nursing homes and other nonacute health care
facilities; and (2) whether the Board should make any change to the approach it
uses to determine appropriate bargaining units more generally.

The AFL-CIO urges the Board to continue to follow its *Park Manor* approach to determining appropriate bargaining units in nursing homes and other nonacute health care facilities. Pursuant to *Park Manor*, the Board generally applies its traditional community-of-interest test to determine bargaining units in nonacute health care facilities. However, where a union petitions for the equivalent to an acute care hospital bargaining unit in this setting, the Board also utilizes background information gathered during the health care industry bargaining unit rulemaking to evaluate the proposed unit. Given the relative similarity between workforces across different health care facilities, the typical result is that a unit that is the *only* appropriate bargaining unit in an acute care hospital is also *an* appropriate bargaining unit in a nonacute health care facility.

As to the Board's general approach to unit determinations, the AFL-CIO urges the Board to continue to apply its traditional community-of-interest test, a test approved of and helpfully described by the D.C. Circuit in *Blue Man Vegas*, *LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). As the D.C. Circuit explained in that case, when a petitioned-for unit is *prima facie* appropriate, the Board should approve the proposed unit unless the employer demonstrates that excluded employees share such an "overwhelming community of interest" with employees in the petitioned-for unit that there is no legitimate basis to exclude them. *Id.* at 421. The petitioned-for group and the excluded employees share an "overwhelming community of interest" when "neither group can be said to have any *separate* community of interest justifying a separate bargaining unit." *Id.* at

422 (quoting *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 120 (D.C. Cir. 1996)) (emphasis added).

1. The Board's current regulation, adopted in its health care industry bargaining unit rulemaking, states that in nursing homes and all other nonacute health care facilities, "[t]he Board will determine appropriate units . . . by adjudication," 29 C.F.R. § 103.30(g), in contrast to the Board's rule for acute care hospitals, which states that eight identified bargaining units are "the only appropriate units," 29 C.F.R. § 103.30(a). In the rulemaking, the Board explained that its decision "to continue a case-by-case approach with respect to nursing homes" was based on "[t]he evidence . . . that there are . . . significant differences between the various types of nursing homes which affect staffing patterns and duties." Collective-Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33900, 33928, 284 NLRB 1528, 1568 (proposed Sept. 1, 1988) ("Second Notice of Proposed Rulemaking"). The Board further explained that "[i]t also appears that there is no need at this time for a rule with respect to nursing homes as there has been no prolonged litigation and no party has expressed any problems in this area." 53 Fed. Reg. at 33929, 284 NLRB at 1568.

In *Park Manor*, decided soon after the Board issued its health care industry bargaining unit rule, a union petitioned to represent employees in a service and maintenance unit in a nursing home. 305 NLRB at 872. The employer challenged the petitioned-for unit, contending that to be appropriate the unit had to include the employer's licensed practical nurses (LPNs). *Ibid.* In its decision, the Board

reaffirmed its conclusion from the rulemaking that it "d[id] not have a sufficient body of empirical data as to nursing homes to make a uniform rule as to them at this time, and perhaps never will because we are not sure that all are sufficiently uniform to warrant finding the same units appropriate for all." *Id.* at 875. Instead, the Board said, it would "take a broader approach utilizing not only 'community of interests' factors but also background information gathered during rulemaking and prior precedent," explaining that "contrasting individual nursing home work forces with those in acute care hospitals would aid in determining appropriate units." *Ibid.*

The *Park Manor* approach can be summarized as follows: in nonacute health care facilities, the Board applies its traditional community-of-interest test to "determine appropriate units . . . by adjudication," 29 C.F.R. § 103.30(g), and is not limited to the mandatory units for acute care hospitals or to any other "uniform rule" limiting which units are appropriate in the nonacute health care setting. *Park Manor*, 305 NLRB at 875. That is, where a union petitions for a unit that is not equivalent to one of the acute care hospital units, the Board evaluates that unit in the same manner as it would a unit in any other industry – *i.e.*, by utilizing the traditional community-of-interest test.

In contrast, where a union petitions for the equivalent to one of the acute care hospital units in a nursing home or other nonacute health care facility, the Board also "utilize[es] . . . background information gathered during the rulemaking" to "contrast[] [the] . . . nursing home work force[]" with comparable

employees in acute care hospitals to determine whether the petitioned-for unit is appropriate. *Ibid.* Because the differences between acute care hospital workforces and nonacute health care facility workforces are typically a matter of degree, not a matter of kind, a unit that is the "*only* appropriate unit[]" in a hospital, 29 C.F.R. § 103.30(a) (emphasis added), is typically *an* appropriate unit in a nonacute health care setting. See Collective-Bargaining Units in the Health Care Industry, 52 Fed. Reg. 25142, 25144, 284 NLRB 1516, 1518 (proposed July 2, 1987) ("First Notice of Proposed Rulemaking") ("[G]roups of employees generally exhibit the same internal characteristics, and relationship to other groups of employees, in one health care facility as do like groups of employees at other facilities.").

¹ In fact, the Board has, in its post-*Park Manor* cases, regularly found the acute care hospital bargaining units to constitute appropriate units in nonacute health care facilities on this basis. See, e.g., Jersey Shore Nursing & Rehab. Ctr., 325 NLRB 603, 603 (1998) (noting that a service and maintenance unit in a nursing home "is appropriate on its face"). To illustrate, in McLean Hospital Corp., 309 NLRB 564 (1992), the Board evaluated a petitioned-for skilled maintenance unit in a nonacute psychiatric hospital based on both community-ofinterest factors and information gathered during the rulemaking. In the rulemaking, the Board found that skilled maintenance "is, essentially, a non-health care occupation involving skills, interests, and job markets largely separate from the hospital itself" and "the[] work bears little relationship to that of other hospital employees." Second Notice of Proposed Rulemaking, 53 Fed. Reg. at 33923, 284 NLRB at 1561. In *McLean*, the Board noted the "striking similarity between the skilled maintenance workforce in acute care hospitals, as described in the rulemaking process, and the skilled maintenance workforce at McLean," including that "[b]oth are highly skilled, as evidenced by licensing and training requirements, more highly paid on average than the remaining non-professionals, and separately supervised." 309 NLRB at 575. On this basis, the Board found the petitioned-for skilled maintenance unit appropriate. *Ibid*.

2. Notwithstanding the fact that, as previously explained, the Board exempted nursing homes and other nonacute health care facilities from the mandatory bargaining unit rule it applied to acute care hospitals, the Employer in this case makes much of a supposed congressional "mandate" to "avoid[] 'undue proliferation' of bargaining units" in nursing homes, claiming that allowing the petitioned-for CNA unit in this case would conflict with this "mandate." Er's Req. for Rev. at 6. The short answer is that there is no such legislative mandate, as we explain below. Moreover, even if there were such a mandate, allowing for CNA units in nursing homes will not cause a proliferation of bargaining units in that context.

The supposed congressional mandate against the proliferation of bargaining units in nursing homes claimed by the Employer is illusory. Prior to the 1974 NLRA amendments, Congress rejected a bill that would have limited the number of bargaining units in nonprofit health care institutions to five. *See Am. Hosp.*Ass'n v. NLRB, 499 U.S. 606, 616 (1991) (discussing S. 2292, 93d Cong., 1st Sess. (1973)). During the following session, Congress passed a different bill extending NLRA coverage to all private health care institutions, a bill that "made no change to the Board's authority to determine the appropriate bargaining unit in each case."

Id. at 615. The legislative history of this later bill stated that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry." *Ibid.* (quoting S. Rep. No. 96-766, at 5 (1974); H.R. Rep. No. 93-1051, at 6-7 (1974)). But, as the Supreme Court succinctly explained: one

"obviously could not . . . contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating." *Id.* at 616; *see also Int'l Bhd. of Elec. Workers v. NLRB (St. Francis Hosp.)*, 814 F.2d 697, 710 (D.C. Cir. 1987)

("[T]here is absolutely nothing in the Act to indicate that Congress intended the 1974 Amendments to restrict the Board's broad discretion under section 9.").²

Moreover, as a practical matter, allowing CNA bargaining units in nursing homes will not lead to a proliferation of units. The number of likely bargaining units in most nursing homes is limited because physicians and other professionals are typically employed by outside professional practices rather than by the nursing home itself and RNs in nursing homes are frequently supervisors. *See* Second Notice of Proposed Rulemaking, 53 Fed. Reg. at 33928, 284 NLRB at 1568 ("[U]nlike hospitals, there are few professionals employed at nursing homes, and of those, most are RNs who serve as head nurses or charge nurses primarily performing administrative duties."). In addition, nursing home LPNs may, depending on the circumstances, be supervisors as well. *See*, *e.g.*, DDE at 2

² The Board was motivated to undertake the health care industry bargaining unit rulemaking in part by the refusal of several courts of appeals to enforce the Board's unit determinations in acute care hospitals, largely based on the courts' acceptance of the argument that there was a congressional mandate against unit proliferation. *See* First Notice of Proposed Rulemaking, 52 Fed. Reg. at 25142-43, 284 NLRB at 1516-17 (describing judicial hostility to the Board's hospital unit determinations). This same argument, however, was later squarely rejected by the Supreme Court. *See Am. Hosp. Ass'n*, 499 U.S. at 615-17.

³ Although in theory there could be a business office clerical unit in a nursing home, in practice there are so few such employees in the typical facility

(parties stipulated that the LPNs employed by Specialty Healthcare are statutory supervisors). In light of the Supreme Court's unanimous approval of the Board's rule allowing for eight units in acute care hospitals, permitting a CNA unit in a nursing home is very unlikely to lead to an "undue proliferation" of bargaining units in that context.

Finally, the Employer in this case contends that allowing the petitioned-for CNA unit will lead to "multiple small, residual, non-conforming units" that are not permitted by *Park Manor*. Er's Req. for Rev. at 29. The claim that "nonconforming units" are not allowed by Park Manor misreads that case: the Board in Park Manor refused to conform its nursing home unit determinations to the acute care hospital bargaining unit rule or any other "uniform [bargaining unit] rule" in favor of case-by-case adjudication, an implicit acknowledgment that nursing home units that do not conform to the mandatory acute care hospital units can be appropriate. More generally, a strict rule against the creation of small residual units would "impl[y] that all employees who share a community of interest must be included in the same unit, . . . conflict[ing] with the principle that more than one bargaining unit may be appropriate in any particular setting." Blue Man Vegas, 529 F.3d at 427 (emphasis added). Thus, in the nursing home setting, every petitioned-for unit must be evaluated on its own merits; that is the

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that they infrequently seek union representation as an independent group. *See* Second Notice of Proposed Rulemaking, 53 Fed. Reg. at 33928, 284 NLRB at 1568 ("In a typical 100 bed nursing home, the business office will have one or two employees."). *See also* Er's Req. for Rev. at 5 n. 5 (stating that there are only two business office clerical employees employed by Specialty Healthcare).

consequence of the Board's decision to exempt nursing homes from the mandatory acute care hospital bargaining unit rule and instead "determine appropriate units in [nursing homes] . . . by adjudication." 29 C.F.R. § 103.30(g).

Even the health care industry bargaining unit rule allows for nonconforming units in acute care hospitals when such units result from stipulations or predate the enactment of the rule. 29 C.F.R. § 103.30(d). Where such nonconforming units exist, the Board permits "a separate residual unit [composed] of] all unrepresented employees residual to those in the existing non-conforming unit," even though this results in a perpetuation of both nonconforming units. St. Mary's Duluth Clinic Health Sys., 332 NLRB 1419, 1421 (2000) (overruling Levine Hosp. of Hayward, Inc., 219 NLRB 327 (1975)). See also Second Notice of Proposed Rulemaking, 53 Fed. Reg. at 33932, 284 NLRB at 1573 ("To the extent a stipulation may later result in the creation of a residual group of unrepresented employees, the Board will address their representation concerns . . . on a case-by-case basis applying the rules insofar as practicable"). It would be anomalous for the Board to allow non-conforming and residual units in hospitals covered by the rulemaking but not in nursing homes where bargaining units are decided by case-by-case adjudication.

3. In situations where a union petitions for a bargaining unit in a nonacute health care facility that is not equivalent to one of the mandatory acute care

⁴ The Employer's citation to *Levine Hospital* as support for its claim that "the Board has repeatedly recognized [that small, residual, non-conforming units] must be avoided," Er's Req. for Rev. at 29, is thus contrary to current Board law.

hospital units, as well as where a union petitions for a unit in any setting other than health care, the Board applies its traditional community-of-interest test. That test has been approved of and helpfully described by the D.C. Circuit in *Blue Man Vegas*, 529 F.3d at 421, as follows: when a petitioned-for unit is *prima facie* appropriate, the Board should approve the proposed unit unless the employer demonstrates that any excluded employees share such an "overwhelming community of interest" with employees in the petitioned-for unit that there is no legitimate basis to exclude them. The petitioned-for group and the excluded employees share an "overwhelming community of interest" when "neither group can be said to have any *separate* community of interest justifying a separate bargaining unit." *Id.* at 422 (quoting *Trident Seafoods*, 101 F.3d at 120) (emphasis added).

It is well-established that in undertaking its statutory responsibility to "decide in each case . . . the unit appropriate for the purposes of collective bargaining," 29 U.S.C. § 159(b), the Board's "focus is on whether the employees share a 'community of interest." *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985). That is, the Board must determine whether the petitioned-for unit consists of "employees who have substantial mutual interests in wages, hours, and other conditions of employment." *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-73 (1971) (quoting 15 NLRB Ann. Rep. 39 (1950)). Factors considered include "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions

and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *United Operations, Inc.*, 338 NLRB 123, 123 (2002). *See generally* J. ABODEELY, THE NLRB AND THE APPROPRIATE BARGAINING UNIT ch. 2 (rev. ed. 1981) (discussing the history and application of each of the Board's traditional community-of-interest factors).

In light of the statute's clear statement that a "unit appropriate for the purposes of collective bargaining" may be "the employer unit, craft unit, plant unit, or subdivision thereof," 29 U.S.C. § 159(b), it follows logically that several different groupings of employees in a workplace may each share a sufficient community of interest to qualify as *an* appropriate unit. *See Am. Hosp. Ass'n*, 499 U.S. at 610 ("[T]he language [of Section 9(a)] suggests that employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." (emphasis in original)); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) ("There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'" (emphasis in original)).

In choosing among alternative appropriate units, the Act's reference to a representative "designated or selected for the purposes of collective bargaining by

the majority of the employees in a unit appropriate for such purposes," 29 U.S.C. § 159(a), when "read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees." *Am. Hosp. Ass'n*, 499 U.S. at 610. Thus, where a union petitions for a *prima facie* appropriate unit – *i.e.*, a unit in which "the employees . . . share a community of interest," *Blue Man Vegas*, 529 F.3d at 421 – the Board should approve the unit unless the employer can show that "the excluded employees share an overwhelming community of interest with the included employees" such that "there is no legitimate basis upon which to exclude them." *Ibid*.

"That the excluded employees share a community of interest with the included employees does not . . . mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate bargaining unit." *Ibid*. Thus, "the employer's burden is to show the *prima facie* appropriate unit is 'truly inappropriate." *Ibid*. (quoting *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000)). *See also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) ("[I]t is not enough for the employer to suggest a more suitable unit; it must

⁵ Similarly, where the Board concludes that a petitioned-for unit is not appropriate under the Act, it should "attempt[] to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications," *The Boeing Co.*, 337 NLRB 152, 153 (2001), rather than simply substituting the employer's preferred unit. In that manner, the Board properly recognizes "that the initiative in selecting an appropriate unit resides with the employees." *Am. Hosp. Ass'n*, 499 U.S. at 610.

show that the Board's unit is clearly inappropriate." (internal quotation marks omitted)). In order to make this showing, the employer must demonstrate that "neither [the petitioned-for] group [nor the excluded employees] can be said to have any *separate* community of interest justifying a separate bargaining unit." Blue Man Vegas, 529 F.3d at 422 (quoting *Trident Seafoods*, 101 F.3d at 120) (emphasis added).

The facts of *Blue Man Vegas* illustrate how the Board's "analytic framework" as described by that decision functions in practice. In that case, the union petitioned to represent a unit composed of six out of seven departments of the stage crew for the popular Blue Man Group theatrical show, including the audio, carpentry, electrics, properties, video, and wardrobe departments — every department except for a small group of "musical instrument technicians" or "MITs." 529 F.3d at 419. The excluded MITs were separately supervised, signed-in separately from other members of the stage crew, primarily worked with the musicians rather than the other stage crew members, had different skills from the

⁶ The Board's statement in *Park Manor* that "the prospective appropriateness of [excluded] employees as a separate unit is . . . the controlling consideration" in determining whether a petitioned-for unit is appropriate, 305 NLRB at 872 n. 18, is thus fully consistent with the Board's traditional community-of-interest test as described in *Blue Man Vegas*. The point is whether the excluded employees "have a[] separate community of interest justifying a separate bargaining unit." 529 F.3d at 422. If so, the excluded employees do not share "an overwhelming community of interest with the included employees" and the proposed unit – assuming it is *prima facie* appropriate – should be approved. *Id.* at 421.

stage crew members in other departments, and, in some cases, were salaried rather than hourly employees. *Id.* at 419-20.

Applying the analytic framework described above, the D.C. Circuit concluded:

A unit comprising all the non-MIT stage crews is *prima facie* appropriate because, notwithstanding the differences among them, those employees share a community of interest. It may well be that a unit comprising all the stage crews, including the MITs, would also be *prima facie* appropriate because the MITs also share a community of interest with the other stage crew employees, but that does not necessarily render the unit comprising only the non-MIT stage crews 'truly inappropriate.' Indeed, both the differences that are unique to the MITs and the differences that can be found among all the stage crews stand in [the employer's] way: The MITs lack an overwhelming community of interest with the other stage crews (just as each of the non-MIT crews may lack an overwhelming community of interest with each of the other non-MIT crews)." *Id.* at 424-25.

The Board's decision in *Overnite Transportation Co.*, 322 NLRB 723 (1996), provides a similar illustration. In that case, the union petitioned for a unit of truck drivers and dock workers at one of the employer's facilities. *Id.* at 723. The employer contended that the unit had to include the employer's mechanics

both because they shared a community of interest with the drivers and dock workers and also because the union had successfully petitioned for units that included mechanics at some of the employer's other facilities. *Ibid*.

The Board rejected both arguments, explaining that they "reflect[ed] a fundamental misapprehension of the Board's 'appropriate' unit principles." *Ibid.* The Board explained that "inclusion of the mechanics here clearly is not required as they could constitute a separate appropriate unit" and therefore "do not share such a close community of interest with drivers and dock workers as would mandate their inclusion in the petitioned-for unit." Id. at 726 (emphasis in original). That the union had petitioned for units that included the mechanics at other facilities was not relevant to the unit determination because unions are not required "to seek the same unit at different locations of the same employer." Id. at 724. Instead, the fact that the union could successfully petition for different units at different facilities of the same employer merely reflected the "well-settled" Board policy that "there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining." *Id.* at 723.

4. Applying the foregoing analytic framework to this case, the Regional Director correctly concluded that the petitioned-for CNA unit constitutes an appropriate unit for collective bargaining, rejecting the Employer's contention that only a wall-to-wall unit of all nonprofessional employees would be appropriate. First, because the petitioned-for unit is not the equivalent to one of the acute care

hospital units, the Regional Director's analysis correctly emphasized the Board's traditional community-of-interest factors. Applying the community-of-interest test, the petitioned-for CNA unit is *prima facie* appropriate at Specialty Healthcare's nursing home because the CNAs indisputably share a community of interest. Because the Employer failed to show that the workers excluded from the unit share an overwhelming community of interest with the CNAs, the petitioned-for unit is an appropriate one.

The Regional Director correctly concluded that the CNAs at Specialty

Healthcare share a community of interest. The CNAs must be state-certified and are required to undertake certain specialized training to obtain and retain this certification. DDE at 3-4. The CNAs are part of the Nursing Department and are supervised by the LPN Charge Nurses and RN Unit Managers. *Id.* at 5. Finally, the CNAs are primarily responsible for the direct care of residents, including "feeding, bathing, dressing, turning, lifting, transporting residents to different areas or activities within the facility, and trimming nails and hair." *Ibid*.

The Employer, for its part, failed to show that the workers it contended should be included in the unit (activity assistants, dietary employees, cooks, the central supply clerk, the medical records clerk, the receptionist, the data entry clerk, the maintenance assistant, the social services assistant, the business office clerical and the coordinator/staffing clerk, DDE at 1-2) share an overwhelming community of interest with the CNAs such that there is no legitimate basis to exclude them from the CNA unit. In contrast to the CNAs, none of the excluded

employees are required to obtain state certification or undertake any specialized training relating to the care of residents. *Id.* at 4. Likewise, none of the excluded employees are supervised by the LPN Charge Nurses or RN Unit Managers or are employed in Specialty Healthcare's Department of Nursing. *Id.* at 3.

The employees who share the closest community of interest with the CNAs are the activity assistants, who must have "a bachelor's degree or equivalent advanced training or certification in a job related area," id. at 4, and who participate to some degree in the care of residents by "assisting residents to participate in organized activities which may include pet therapy, music therapy, church services, bingo, and arts and crafts." *Id.* at 7. Unlike the activity assistants, however, "[t]he CNAs are the only employees who assist residents with dressing, bathing, and eating" and "who are assigned the care of individual residents, as opposed to participating in generalized activities or functions." *Id.* at 12. Thus, although the activity assistants share *some* community of interest with the CNAs, that common community of interest is not so "overwhelming" that "neither [the CNAs nor the activity assistants] can be said to have any *separate* community of interest." Blue Man Vegas, 529 F.3d at 422 (emphasis added). Therefore, the activity assistants may properly be excluded from the petitioned-for CNA unit.

CONCLUSION

The AFL-CIO urges the Board to continue to determine appropriate bargaining units in nonacute health care facilities by applying the approach set forth in *Park Manor* as explained herein. In determining appropriate bargaining

units more generally, the Board should continue to use its traditional community-of-interest test, a test approved of and helpfully described by the D.C. Circuit in *Blue Man Vegas*. Applying these approaches to the facts of this case, the Board should affirm the Regional Director's decision finding that the petitioned-for CNA unit is an appropriate unit for collective bargaining.

Dated: March 8, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 8, 2011, I caused to be served a copy of the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* by electronic mail on the following:

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